Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

IN RE: SEALED APPELLANT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

A. GILL DYER
908 W. 25th Ave.
Covington, LA 70433
(504) 898-3621
Defendant-Appellant
Pro Se

58 pp

QUESTION PRESENTED

Whether it was error for the United States Court of Appeals for the Fifth Circuit to affirm, in a per curiam opinion, the actions of the United States District Court for the Eastern District of Louisiana, which failed to follow its own Local Rules on Disciplinary Enforcement and violated the procedural due process rights of petitioner, an attorney and a party to a disciplinary action before that court, when it denied a Motion To Dismiss For Failure to State a Claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure and then, immediately disbarred the petitioner from practice before the United States District Court for the Eastern District of Louisiana, without affording him any right to conduct discovery, to confront witnesses against him or conduct a trial on the merits.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, A. Gill Dyer, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is not reported due to a sealed record. The opinion of the district court is not reported.

JURISDICTION

The court of appeals entered its judgment on November 25, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

Local Rule 83.2.10E(I)(B), Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, provides in relevant part that all procedures in disciplinary actions, including discovery, shall be governed by the Federal Rules of Civil Procedure.

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a party to file a Motion To Dismiss For Failure to State a Claim prior to a trial on the merits.

Fifth and Fourteenth Amendments to the United States Constitution guarantee procedural due process.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the State of Louisiana. In November 1993, he was asked by a newly admitted attorney to whom he had offered office space to handle a personal injury lawsuit arising out of an automobile accident. In November, 1994, Petitioner successfully settled a portion of the claim with one of three defendants. This defendant had a medical payment provision of $5000.00 on its auto liability policy. Petitioner received four medical payment checks from the settling defendant's insurer and credited the full amount against the client's cost which accrued as the litigation progressed. After settlement with the one defendant, referral counsel contacted the client to discharge petitioner. About the same time petitioner was discharged, a fifth medical payment check was received and placed into the client's cost file. The referral attorney moved out of petitioner's office, but returned one day prior to discharge of petitioner by the client and lied to petitioner's secretary that he was bringing the client's file to petitioner at an expert's office. In its "Findings and Recommendations", App. 37, the district court found that Schmidt removed the file under "false pretences". Attorney Schmidt who stole the file is the same one who made the bar complaint against petitioner. Petitioner was attending a conference with the expert for trial preparation against the remaining defendants. The fifth medical payment check was in the client's file when the file was

removed by the referral attorney's fraud. Petitioner never saw the fifth check again. Three months later the fifth check was mysteriously deposited into petitioner's personal account. During the referral attorney's fraudulent entry into petitioner's office, he asked to use the telephone privately and had access to deposit slips and information on petitioner's checking accounts. Petitioner believes the referral attorney fraudulently deposited the fifth medical payment check into petitioner's personal account. The referral attorney then made a bar complaint to the district court which is the subject of this writ. App. 10-11. The district court accepted the complaint, App. 12-13, and petitioner filed the Rule 12(b)(6) Motion to Dismiss For Failure to State a Claim. App. 15-24.

The district court held a cursory hearing on September 23, 1996, on the Rule 12(b)(6) motion and issued "Findings and Recommendations" which included disbarment. App. 26-43. At the district court hearing, petitioner was not permitted to call fact witnesses and handwriting experts nor cross-examine prosecution witnesses. The district court disbarred petitioner without a trial on the merits on October 2, 1996. App. 25. A proper application of the Federal Rules of Civil Procedure would have been to deny the Rule 12(b)(6) motion and then proceed with a trial on the merits. Petitioner was not given this fundamental right of procedural due process. Following the Motion Hearing on petitioner's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, the district court issued only "Recommendations", and petitioner had every reason to expect a trial on the merits would be scheduled. Rule I(B) of the Disciplinary Rules of the United States District Court, Eastern District of

Louisiana specifically state that the Federal Rules of Civil Procedure shall apply in its disciplinary proceedings. App. 44. The district court failed to follow its own Disciplinary Rules when it denied the Rule 12(b)(6) motion and disbarred Petitioner without permitting a trial on the merits. The district court flagrantly violated procedural due process, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, when it failed to follow its own Disciplinary Rules. The Fifth Circuit Court of Appeals, in cavalier fashion, affirmed the abuses of the district court in its per curiam opinion. App. 1-9.

ARGUMENT

This case involves the disbarment of an attorney in a disciplinary proceeding by a United States District Court which grossly violated procedural due process by failing to follow its own Disciplinary Rule I(B) which required adherence to the Federal Rules of Civil Procedure. App. 44. The disciplinary proceeding was commenced by the district court and petitioner filed a Rule 12(b)(6) Motion To Dismiss For Failure To State A Claim; the motion was denied, and the district court ordered disbarment without an opportunity to conduct discovery, cross-examine witnesses or to have a trial on the merits.

It is well settled that federal district courts are bound by their own disciplinary rules when proceeding against an attorney for violation of ethical standards. *United States v. Stoneberger*, 805 F.2d, 1391, 1393 (9th Cir. 1986); *Matter of Abrams*, 521 F.2d 1094, 1104-05 (3d Cir.), cert.

denied, 423 U.S. 1038, 96 S.Ct. 574, 46 L.Ed.2d 413 (1975). Rule I (B) of the Rules of Disciplinary Enforcement of the United States District Court for the Eastern District of Louisiana, reads, in relevant part:

> "(B) [a]ll procedures in disciplinary actions . . . shall be governed by the Federal Rules of Civil Procedure." App. 44.

A fundamental principle of statutory construction dictates that specific words within a statute may not be read in isolation from the remainder of the statutory scheme. This principle was literally stampeded upon by the district court and Fifth Circuit Court of Appeals. *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987). The language of the court's statutory scheme as it applies to this disciplinary proceeding is in mandatory terms throughout. The word in Rule I(B) is "shall" not "may". In fact, the district court issued a specific order, dated August 1, 1996, which stated that:

> "[A]. Gill Dyer filed a "Motion to Dismiss Disciplinary Proceedings for Failure to State a Claim." Since the Rules of Disciplinary Enforcement of this Court are governed by the Federal Rules of Civil Procedure, Dyer is permitted to file such a motion." App. 14.

The district court and the Fifth Circuit Court of Appeals were at least able to apply this much of the Federal Rules of Civil Procedure, but for reasons known only to them, deliberately chose to ignore the remainder of the Federal Rules of Civil Procedure which control proceedings after a 12(b)(6) Motion To Dismiss For Failure to State a Claim is denied. It is elementary Federal Civil Procedure that the denial of a Rule 12(b)(6) motion

does not end the proceeding for the party against whom the court ruled. Just the opposite is the case. When a 12(b)(6) motion is denied, the case proceeds forward with discovery, a trial on the merits is scheduled during which the procedural due process requirements of the opportunity to cross-examine witnesses, introduce documentary evidence and present factual and expert testimony must be met. *Murphy v. Inexco Oil Co.*, 611 F.2d 570 (5th Cir. 1980). In its opinion, the Fifth Circuit panel stated:

> "The court followed its procedures, as outlined in Rule 83.2.10E, to the letter; it was Sealed Appellant who chose to duplicate the prescribed procedures when he filed a 12(b)(6) motion for failure to state a claim instead of simply complying with the court's order to show cause." App. 5.

The Federal Rules of Civil Procedure do not permit duplication, but they do require not only the litigants but the district court to follow them. If the motion had been granted by the district court, the proceeding would have been concluded at that level. Because the motion was denied, it was improper for the district court to disregard the remainder of the Federal Rules of Civil Procedure and eliminate procedural due process by denial of discovery and a trial on the merits. *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed. 135. The district court issued a specific order that the Federal Rules of Civil Procedure applied to this disciplinary proceeding. App. 14. The Fifth Circuit eliminated procedural due process when it stated that petitioner "elected to file a 12(b)(6) motion and cannot now

complain of the results". App. 5. Rather than being interested in the district court's results, petitioner only sought procedural due process by a trial on the merits following denial of the 12(b)(6) motion.

Attorney disbarment cases are quasi-criminal in character. *In re Ruffalo*, 390 U.S. 544, 551, 88 S. Ct. 1222, 1226, 20 L.Ed.2d 117 (1968). Therefore, the court's disciplinary rules are to be read strictly, resolving any ambiguity in favor of the attorney charged. The Fifth Circuit seemed to be of the opinion that the mandatory application of the Federal Rules of Civil Procedure did not apply to this disbarment proceeding. In the district court, not only did the local Disciplinary Rule I(B) mandate application of the Federal Rules of Civil Procedure, but the district court in its August 16, 1996 order expressly stated that the court was governed by the Federal Rules of Civil Procedure and that the 12(b)(6) motion was permitted. App. 14. It is clear that the Fifth Circuit did not protect the procedural due process rights of petitioner nor did it require the district court to follow its own disciplinary proceedings.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Court Of Appeals Decision That Procedural Due Process Was Not Violated Conflicts With Its Existing Case Law

In *Matter of Thalheim*, 853 F.2d 383 (5th Cir. 1988), the Fifth Circuit held that the district court violated procedural due process by failing to follow its own requirements concerning proper disciplinary proceedings and

that the court's regulatory scheme as it applies to a disciplinary proceeding is mandatory. In the case *sub judice,* the Fifth Circuit held the opposite of its decision in *Matter of Thalheim* and ruled that the district court did not violate procedural due process and permitted the district court to depart from its regulatory scheme and disregard the Federal Rules of Civil Procedure.

II. The Question Presented Is Important

Safeguarding the right of procedural due process and supervision by this Court of the Fifth Circuit Court of Appeals and the district court is critical to guarantees provided by the United States Constitution. A district court's disciplinary rules, especially in the case of disbarment should be strictly enforced. The district court drafted its disciplinary rules and the Fifth Circuit failed to insure that they were strictly enforced. The opinion of the Fifth Circuit is an extreme departure from the accepted and usual course of judicial proceedings and as such calls for the exercise of this Court's supervisory power.

CONCLUSION

The Fifth Circuit failed to prevent the violation of procedural due process in a disciplinary proceeding and failed to require the district court to follow its own requirements concerning a disciplinary proceeding and to adhere to the Federal Rules of Civil Procedure. For these

compelling reasons, the writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-31147
(Summary Calendar)

(Filed Nov. 25, 1997)

IN RE: SEALED APPELLANT,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana
(95-CV-1939-T)

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

In this disbarment action, Defendant-Sealed Appellant appeals the order of the United States District Court for the Eastern District of Louisiana, disbarring him from practice before that court. Sealed Appellant asserts that the district court failed to abide by its own local disciplinary rules and that the procedures followed in this case violated his right to due process of law. Finding no merit in either argument, we affirm.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

FACTS AND PROCEEDINGS

This appeal stems from a complaint lodged with the district court, alleging that Sealed Appellant committed professional misconduct by (1) assessing his client excessive and fictitious charges, in violation of Rule 8.4(c) of the Rules of Professional conduct,[1] (2) forging his client's signature on a check and depositing it into his own account, in violation of Rule 8.4(c) of the Rules of Professional Conduct, and (3) concealing or knowingly failing to disclose to the court a fact material to the disposition of issues before it, or both, in violation of Rule 3.3(a)(2) of the Rules of Professional Conduct. As provided in Local Rule 83.2.10E(III)(A)(3) of the Eastern District of Louisiana, the complaint was referred to the district court *en banc*. The complaint was docketed, and on June 14, 1995, the judge handling the case appointed an assistant United States Attorney (AUSA) to investigate the matter. The AUSA took several depositions, subpoenaed records, and interviewed witnesses. After completing his investigation the AUSA filed his report and recommendation on May 1, 1996. Based on this recommendation, the district court *en banc* instructed the AUSA to file a formal complaint against Sealed Appellant. Pursuant to Local Rule 83.2.10E(III)(C)(1), Sealed Appellant was ordered to show cause within thirty days from the service of the complaint why he should not be disbarred or otherwise disciplined.

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[1] Pursuant to Local Rule 83.2.10E(I)(D), the Eastern District has adopted the Rules of Professional conduct as promulgated by the Supreme Court of Louisiana.

Instead of complying with the show cause order, Sealed Appellant elected to file a motion to dismiss for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court ruled that this motion was permissible, as Local Rule 83.2.10E(I)(B) provides that disciplinary proceedings shall be governed by the Federal Rules of Civil Procedure, and ordered the AUSA to respond. The court also noted that the motion would be decided on the briefs, after which the court would make its recommendation of any discipline to be imposed. Concluding that there were unresolved issues of fact, however, the court held a hearing in chambers on the motion on September 7, 1996, pursuant to Local Rule 83.2.10E(III)(c)(3). On September 23, the court submitted its report and recommendation to the district court *en banc*.

On the same day, Sealed Appellant filed a notice of deposition, seeking to depose the AUSA appointed to investigate his case. The government's motion to quash the subpoena was granted on September 30, 1996, because Sealed Appellant's notice of deposition failed to comply with the regulations governing requests for testimony by Department of Justice personnel. Sealed Appellant was disbarred from the Eastern District of Louisiana by order of the *en banc* court dated October 2, 1996, and this appeal followed.

II.

DISCUSSION

Sealed Appellant asserts that the district court erred by (1) failing to observe its own disciplinary rules, and (2)

depriving him of due process of law by deciding the merits of his case immediately after ruling on his motion to dismiss and by improperly shifting the burden of proof. We review orders imposing disciplinary sanctions against attorneys for abuse of discretion.[2] "When the procedure the district court uses in imposing sanctions raises due process issues of fair notice and the right to be heard," However, our review is plenary.[3]

It is well-settled that federal district courts are bound by their own disciplinary rules when proceeding against attorneys for violations of ethical standards.[4] The United States District court for the Eastern District of Louisiana has adopted a detailed set of local rules for disciplinary enforcement. Rule 83.2.10E(I)(B) of those local rules states that "[u]nless otherwise provided by these or other applicable local rules or otherwise determined by the court, all procedures in disciplinary actions, including discovery, shall be governed by the Federal Rules of Civil Procedure." Sealed Appellant asserts that the district court erred when it decided the merits of his disbarment action immediately after ruling on his motion to dismiss for failure to state a claim, arguing that the court should have allowed him additional time in which to conduct discovery and prepare a defense, as provided by the Federal Rules of Civil Procedure.

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[2] *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55, 111 S. Ct. 2123, 2138, 116 L. Ed. 2d 27 (1991); *Resolution Trust Corp. v. Bright*, 6. F.3d 336, 340 (5th Cir. 1993).

[3] *Martin v. Brown*, 63 F.3d 1252, 1262 (3rd Cir. 1995).

[4] *In re: Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988).

We perceive no error in the actions of the district court in this case. The court followed its procedures, as outlined in Rule 83.2.10E, to the letter; it was Sealed Appellant who chose to duplicate the prescribed procedures when he filed a 12(b)(6) motion for failure to state a claim instead of simply complying with the court's order to show cause. Although the local rules provide that disciplinary proceedings shall be conducted according to the Federal Rules of Civil Procedure, this rule does not apply when different procedures are "otherwise provided by these . . . local rules or otherwise determined by the court." In this instance, the local rules specify and the court ordered that Sealed Appellant show cause why he should not be disbarred. When Sealed Appellant elected to file a 12(b)(6), the court allowed it, ordered the AUSA to respond, and then held a hearing to clarify issues of fact pursuant to Rule 83.2.10E(III)(C)(3). As Sealed Appellant consciously elected to pursue the Rule 12(b)(6) path in addition and in preference to the one expressly dictated by the rules and the court, he cannot now complain of the results. At a minimum, the district judge in charge implicitly denied Sealed Appellant's motion to dismiss when the judge ruled against him under the local rules, and that was several days prior to the court's en banc judgment.

Sealed Appellant further maintains that the local rules violate his due process rights, both facially and as applied to his case. Although disbarment is designed to protect the public, the Supreme Court has recognized that disbarment serves as a "punishment or penalty imposed

on a lawyer."[5] As such, an attorney threatened with disbarment is entitled to procedural due process, including notice of the charge and an opportunity to be heard.[6] A disbarment proceeding is "adversarial and quasi-criminal in nature, and the moving party bears the burden of proving all elements of a violation."[7] Moreover, "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction."[8] Nevertheless, "the due process rights of an attorney in a disciplinary proceeding 'do not extend so far as to guarantee the full panoply of rights afforded to an accused in a criminal case.' "[9]

There is no question in this case that Sealed Appellant had notice of the charges against him. After months of investigation, the AUSA, at the direction of the district court *en banc*, filed and served on Sealed Appellant a detailed complaint formally instituting disciplinary proceedings and setting forth the alleged acts of misconduct. We conclude that the notice requirement was more than satisfied.

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[5] *In re Ruffalo*, 390 U.S. 544, 550, 88 S. Ct. 1222, 1226, 20 L. Ed. 2d 383 (1968).

[6] *Id.*; *Selling v. Radford*, 243 U.S. 46, 51, 37 S. Ct. 377, 379, 61 L. Ed. 585 (1917); *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992).

[7] *Medrano*, 956 F.2d at 102.

[8] *Id.*

[9] *Rasatos v. Colorado Supreme Court*, 746 F.2d 1429, 1435 (10th Cir. 1984), *cert. denied*, 471 U.S. 1016, 105 S. Ct. 2019, 85 L. Ed. 2d 301 (1985) (quoting *People v. Harfmann*, 638 P.2d 745 (Col. 1981)).

And, contrary to Sealed Appellant's assertions, we also conclude that he had sufficient opportunity to be heard. The court ordered Sealed Appellant to show cause why he should not be disbarred. This afforded Sealed Appellant an ample opportunity to present a defense to the charges or submit evidence in mitigation.[10] Instead of taking advantage of this opportunity to be heard by complying with the show cause order, however, Sealed Appellant chose to challenge the allegations on the law.[11] The district court allowed his Rule 12(b)(6) motion to be filed and stated that it would make a recommendation regarding discipline after ruling on the motion. Concluding that there were factual issues in dispute, however, the district court held a hearing at which it appears that Sealed Appellant testified.[12]

Although Sealed Appellant insists that the district court thwarted any efforts to conduct discovery, a review

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[10] *See* Local Rule 83.2.10E(III)(C)(2) ("The respondent-attorney shall file a written response within the prescribed time, either admitting or denying the alleged misconduct, . . . together with whatever matters he/she wishes to assert in defense.").

[11] In reality, Sealed Appellant's motion, although not altogether clear, seems to assert not that the complaint did not state facts sufficient to constitute misconduct, but that Sealed Appellant had not committed the charged acts. As such, the pleading reads more like an answer to a complaint than a motion to dismiss for failure to state a claim.

[12] As this hearing was held in chambers, we do not have a record of those proceedings. We note, however, that other circuits have held that procedural due process in a disbarment proceeding does not require an evidentiary hearing, so long as the attorney has sufficient opportunity to be heard. *See In re: Evans*, 834 F.2d 90, 91 (4th Cir. 1987).

of the record shows that Sealed Appellant only attempted to notice one deposition – that of the AUSA – which was quashed because Sealed Appellant failed to follow the correct procedures for deposing Justice Department officials. Based on these considerations, we conclude that Sealed Appellant had sufficient opportunity to contest the charges, thereby satisfying the dictates of due process. The fact that Sealed Appellant chose not to take advantage of these opportunities does not alter this conclusion. In passing, we note that we have previously cited with approval the vary local rules challenged in this case.[13]

Finally, Sealed Appellant submits that the procedure set forth in Rule 83.2.10E(III)(C)(1) – that an attorney be required to "show cause . . . why he/she should not be disbarred or suspended or other discipline imposed" – unlawfully shifts the burden of proof from the complainant to the attorney. Sealed Appellant argues that, whereas this "show cause" procedure may pass constitutional muster in the case of an attorney who has been convicted of a crime or who has been disciplined by another tribunal, it is unconstitutional in the case of an attorney who has merely been charged with an offense. Sealed Appellant misconstrues – more accurately, mischaracterizes – these disciplinary proceedings. The filing of a formal disciplinary complaint is akin to the prosecution "making its case" in the criminal context. The show cause order does not shift the burden to the attorney and require him

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[13] *See Id.*, at 102 n.2. (referring to previous edition of rules, with different numbering but similar substance as those at issue in this case).

to disprove the allegations against him, but merely provides the attorney with an opportunity to rebut the evidence gathered by the AUSA. In other words, regardless of the quality of the attorney's rebuttal evidence, if the district court does not find the evidence submitted by the AUSA sufficient to prove the case against the attorney by the "clear and convincing" standard, the court may not discipline the attorney. We are satisfied that the local rules did not deprive Sealed Appellant of his right to due process by an impermissible shift in the burden of proof.

III.

CONCLUSION

For the foregoing reasons, the order of the district court, disbarring Sealed Appellant, is in all respects

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF — MISCELLANEOUS

A. GILL DYER — NO. 95-1939 "T"

(Filed Jun. 20, 1995)

A complaint from F. Evans Schmidt stating an instance of possible misconduct by A. Gill Dyer, a member of the bar of this court, was received and was referred to the court *en banc* for determination by a majority of the active judges of the action to be taken. The court unanimously determined that the matter should be pursued as provided by Rule III(B)(1) of the Rules of Disciplinary Enforcement of this court. Accordingly,

IT IS ORDERED that Assistant United States Attorney Thomas L. Watson is appointed to investigate this matter and to make a report thereon in writing to the undersigned appointing United States District Judge for submission to and consideration by the court meeting *en banc*. Counsel may include in the report a recommendation for or against institution of disciplinary action and shall give the reasons thereof.

IT IS FURTHER ORDERED that a copy of this order of appointment and investigation, together with a copy of the letters from F. Evans Schmidt, shall be mailed to A. Gill Dyer via registered or certified mail, return receipt requested.

New Orleans, Louisiana, this 20th day of June, 1995.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF	**MISCELLANEOUS**
A. GILL DYER	**NO. 95-1939 "T"**

ORDER

(Filed May 10, 1996)

Pursuant to Rule III(B)(1) of the Rules of Disciplinary Enforcement of this Court, Assistant United States Attorney Thomas L. Watson was appointed to investigate the attorney misconduct complaint received from F. Evans Schmidt against A. Gill Dyer, a member of the bar of this court. Following Assistant United States Attorney Watson's investigation, this matter was referred to the court *en banc* for a determination by a majority of the active judges of the action to be taken. The court unanimously determined that the matter should be pursued as provided by Disciplinary Rule III(C). Accordingly,

IT IS ORDERED that Assistant United States Attorney Thomas L. Watson file a formal disciplinary complaint against attorney A. Gill Dyer.

IT IS FURTHER ORDERED that a copy of this order, the disciplinary complaint, and all pertinent exhibits thereto be served upon A. Gill Dyer by registered or certified mail, return receipt requested.

IT IS FURTHER ORDERED that Mr. Dyer show cause within 30 days after service of the disciplinary complaint and all pertinent exhibits thereto why he should not be

disbarred or suspended or other disciplinary action imposed.

New Orleans, Louisiana, this 10th day of May, 1996.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF **MISCELLANEOUS**

A. GILL DYER **NO. 95-1939 "T"**

ORDER

(Filed Aug. 1, 1996)

The records of this Court show that on July 25, 1996, A. Gill Dyer filed a "Motion to Dismiss Disciplinary Proceedings for Failure to State a Claim." Since the Rules of Disciplinary Enforcement of this Court are governed by the Federal Rules of Civil Procedure, Dyer is permitted to file such a motion. Disc. Rule I(B).

IT IS ORDERED that Assistant United States Attorney Thomas L. Watson file a response to Dyer's motion no later than Friday, August 16, 1996. Dyer's motion will be decided on the briefs without oral argument, and a recommendation regarding what discipline should be imposed, if any, will be presented to the Court *en banc* base upon the written submissions.

New Orleans, Louisiana, this 1st day of August, 1996.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

	*	
IN RE: A. GILL DYER	*	**MISCELLANEOUS**
	*	**NO: 95-1939 "T"**
	*	

MOTION TO DISMISS DISCIPLINARY PROCEEDINGS FOR FAILURE TO STATE A CLAIM

NOW UNTO COURT, comes A. Gill Dyer, intervenor and moves to dismiss the disciplinary proceedings for the reasons more fully outlined in the memorandum attached hereto.

Respectfully submitted,

MARTIN E. REGAN, JR. – #11153
2125 St. Charles Avenue
New Orleans, Louisiana 70130
Telephone: (504) 522-7260

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing same in the United States Mail, first class, postage prepaid and properly addressed, this 25th day of JULY, 1996.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

IN RE: A. GILL DYER	*	**MISCELLANEOUS**
	*	**NO.: 95-1939 "T"**
	*	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PETITION TO INSTITUTE DISCIPLINARY PROCEEDINGS

MAY IT PLEASE THE COURT:

This claim originally arose out of an intervention for attorney's fees and costs by attorney, A. Gill Dyer (hereinafter referred to as intervenor), from settlements with two (2) separate defendants from the lawsuit of Lenuel Bragg.

On or about November 4, 1993, intervenor entered into a contract with F. Evans Schmidt (hereinafter referred to as Schmidt), an attorney representing the original plaintiff, Lenuel Bragg (hereinafter referred to as Bragg). Prior to November 4, 1993, intervenor provided Schmidt with office space "rent free", and Schmidt had access to the entire office suite. The contract between intervenor and Schmidt was introduced as **Intervenor's Exhibit "H"** and provided that the attorney's fee would be split 40% to intervenor and 60% to Schmidt. The contract also provided that intervenor would pay *"all costs"* and be reimbursed out of settlement or judgment.

Prior to December 2, 1994, Intervenor negotiated a settlement with defendant, State Farm Insurance Company, for its policy limits, of $25,000.00. On December 2,

1994, intervenor met with Schmidt at Schmidt's office to disburse the $25,000.00 settlement. On the morning of December 2, 1994, intervenor provided Schmidt with **Intervenor's Exhibit "E"**, Final Disbursement, and **Intervenor's Exhibit "D"**, Interim Cost Bill, dated November 22, 1994. On page two (2) paragraph four (4) U.S. Attorney Watson states that Schmidt "asked Dyer for an itemized accounting". An itemized accounting, **Exhibit "D"** was provided to Schmidt on December 2, 1994.

In accordance with the contract between intervenor and Schmidt, intervenor was paid an attorney's fee of $4,000.00. In addition, intervenor received $5,978.20 as a partial-payment of costs, which reduced **Intervenor's Exhibit "D"** cost amount from $7,556.20 to $1,578.00. (*$7,556.20 - $5,978.20 = $1,578.00*). The $4,000.00 fee payment to intervenor and the $5,978.20 partial cost payment, from Schmidt to intervenor were introduced as **Intervenor's Exhibit "F".**

After the $35,000.00 settlement with State Farm, there were still several defendants remaining.

On December 6, 1994, intervenor received a letter from Bragg, discharging him as counsel of record. Sometime prior to December 14, 1994, Schmidt negotiated a settlement with the remaining defendants, for the sum of $23,000.00. The December 14, 1994 settlement draft from the remaining defendants was introduced as **Intervenor's Exhibit "I".**

Intervenor's Exhibits "A" – "D" represent interim cost invoices, dated May 31, 1994, June 30, 1994, August 31, 1994 and November 22, 1994.

In addition, State Farm made med-pay payments in the amounts of $130.00, $1,628.00, $65.00, and $625.00. These med-pay checks are attached hereto as **Intervenor's Exhibit "N"**, in globo. These med-pay payments were credited to the client's cost account and are reflected in **Intervenor's Exhibits "A"-"D"**.

Due to the fact that Bragg discharged intervenor on December 6, 1994, intervenor intervened for attorney's fees and outstanding costs from the $23,000.00 settlement with the remaining defendants. The outstanding costs, from **Intervenor's Exhibit "D"**, were $1,578.00 (*$7,556.20 - $5,978.20 = $1,578.00*). Intervenor's December 1, 1994 cost invoice indicated additional cost of $846.70. When the previous outstanding cost balance, $1,578.00, is added to the December 1, 1994 cost, a total cost of $2,424.70 remained outstanding. (*$1,578.00 + $846.70 = $2,424.70). Intervenor's December 1, 1994 cost invoice, in the amount of $846.70, was introduced as* **Intervenor's Exhibit "G"**.

In addition, in accordance with the attorney's fee portion of the contract between intervenor and Schmidt (**Intervenor's Exhibit "H"**), intervenor was owed 40% of the 40% contingency contract, or $3,680.00. (*$23,000.00 x 40% = $9,200.00*) (*$9,200.00 x 40% = $3,680.00*). When the outstanding costs from the December 1, 1994 cost invoice (**Intervenor's Exhibit "G"**), in the amount of $2,424.70 was added to the outstanding fee, $3,680, a total of $6,104.70 was owed to intervenor in attorney's fees and costs. (*$2,424.70 + $3,680.00 = $6,104.70*).

On the afternoon of December 5, 1994, Schmidt came to the office of intervenor and removed the entire Bragg file by lying to intervenor's secretary and advising her

that the entire Bragg file was being picked up for intervenor. The Bragg file contained documentation for costs, including records for phone calls, telefacsimiles, copy costs, invoices for costs paid, outstanding invoices copies of all prior med-pay checks which had been endorsed and deposited, the deposit slips for the med-pay checks and the final med-pay check from State Farm. The Bragg file was removed by Schmidt's theft when he advised the secretary of intervenor that he was taking the file to meet with intervenor at a conference with Bragg's treating neurologist. Schmidt never provided the Bragg file to intervenor, and the entire Bragg file remained in the possession of Schmidt until it was placed into the registry of the court. The Affidavit of Yvonne J. Burst, secretary to intervenor, regarding the theft of the entire Bragg file by Schmidt, is attached as **Intervenor's Exhibit "O".**

In paragraph twenty-four (24) of the petition, page nine (9) the faulty reason of U.S. Attorney Watson in on fully display. He states that "Schmidt could not have forged the endorsement on the final $980.00 med-pay check because Schmidt received the two earlier checks (prior med-pay checks) sometime after April 29, 1995. If U.S. Attorney had properly investigated this matter, be [sic] would have known that the earlier med-pay checks with endorsements and deposit slips were obtained by Schmidt on December 5, 1995, when he came to intervenor's office, lied to the administrative staff and removed the entire Bragg file by theft. Therefore, Schmidt had from December 5, 1995, until March 20, 1995 to practice his forgery on the last med-pay check. Such

neglect on the part of an officer of the Court in investigating a matter of this magnitude is inexcusable and his incompetence is frightening.

Finally in paragraph twenty-six (26), pages nine-ten (9-10), Watson opines that Schmidt could not have obtained a deposit slip for my personal account. The office that Schmidt gained access to by lying to intervenor's secretary contained intervenor's personal banking account deposit slip. Why could an individual who lied to gain access to an office not remove a deposit slip. If this is any indication of a "proper and complete" investigation by an assistant U.S. attorney perhaps the United States Attorney for the Eastern District should conduct an inspection of Watson's other files to detect such glaring flaws in reasoning.

Schmidt has contested the following charges from intervenor's November 22, 1994 cost invoice (**Intervenor's Exhibit "D"**):

11/15/93 Dr. Friedman medical expenses $375.00

12/22/93 Dr. Millet medical expenses $750.00

3/31/94 DIS MRI medical expenses $2,195.00

5/5/95 Janet Parker deposition fee $228.70

6/8/94 Bennett's Camera invoice.....$17.14

6/29/94 Expert testimony fee $415.00

8/31/94 Deposition of Lott & Machella $569.00

9/20/94 Deposition of Lavergn $261.15

10/5/94 Dr. Friedman medical expense $130.00

11/14/94 Deposition of Dr. Friedman $169.20

11/14/94 Dr. Friedman medical expense $130.00

TMI Video re: closed head injuries $699.00

When the total amount of attorney's fees and costs owed, $6,104.70, is reduced by the above calculation of $3,100.57, an amount of $3,004.13 remains outstanding to intervenor for attorney's fees and costs. (*$6,104.70 – $3,100.57 = $3,004.13*).

After the hearing of this matter, intervenor received a payment of $1,182.73 from the clerk of court for a portion of the attorney's fee. This amount was later placed back into the registry of the court by intervenor and *"paid"* to Bragg. The Court awarded intervenor his attorney fee of $3,680.00 when the total outstanding cost owed to intervenor in the amount of $2,424.70 is subtracted form Bragg's disputed amount of $3,100.57, Bragg is allegedly owed $579.43. Bragg was paid $1,182.73 by the court and intervenor is still owed $603.30 ($1,182.73 – $579.43 = $603.30).

The November 3 contract between intervenor and Schmidt states that:

> (I.) Also agree to pay *"all costs"* in this matter and will be reimbursed out of the settlement and/or judgment.

Intervenor's Exhibit "H".

The contract between intervenor and Schmidt is very clear that *"all costs"* are to be paid out of any settlement.

There were two (2) separate settlements from this litigation, and there are no costs incurred by intervenor which should not be reimbursed at the full rate charged.

In his Brief, Bragg *has* cited the case of *Henican, James and Cleveland v. Strate*, 348 So.2d 689 (4th Cir. 1997) for the proposition that intervenor should not be reimbursed for photocopy costs, telefacsimiles, postage, parking and mileage at the rates requested by intervenor, but rather some reduced rate to be set by the court. In *Henican*, id at 689, the contract involved stated that the attorney was to be reimbursed only those "out of pocket expenses". The language between intervenor and Bragg clearly does not contain such language, and there should not be any limitation upon intervenor to charge the rates actually listed on **Intervenor's Exhibit "D"** for photocopies, faxes, postage, parking and mileage. The record indicates that photocopies were charged at the rate of $.40/page; Faxes at the rate of $5/fax (sent or received); postage at the rate stated for each particular item mailed; mileage at $.40/mile and parking at what ever the actual rate was. Bragg, in it's initial Memorandum indicated that there are no records for photocopies, faxes, postage, parking and mileage, other than interim cost bills, and as such, intervenor should not be allowed to recover these items.

What should be kept in mind that counsel for Bragg, Schmidt, removed the ***entire*** Bragg file, which included documentation for *all* of these costs and the final State Farm med-pay check, by theft on December 5, 1994. The daily logs which recorded costs for all of these cost items sought by intervenor were contained in the "Cost File" removed by Schmidt. However, charges for these costs are clear from **Intervenor's Exhibits "A" – "D"**, and the

law is clear that intervenor should be able to recover all necessary and reasonable expenses. *Calk v. Highland Construction and Manufacturing*, 376 So.2d 495 (LA 1979) at p.500. Quite unlike the contract in *Henican*, the contract between intervenor and Schmidt provides that *"all costs"* shall be reimbursed, and intervenor is entitled to these costs because they were necessary and reasonable.

The Report and Recommendation disallowed a $200/file set-up and a $450.00 charge by Mike Fagan for service of subpoenas. Certainly the setting up of a file takes some time and materials for which intervenor should be reimbursed. This charge has been set at a reasonable rate of $200/file, and there is no indication that this charge should be subsumed in a contingency contract.

The invoice of Mr. Fagan in clear in its amount and was necessary due to the fact that three (3) witnesses had to be served in Plaquemines Parish, and Mr. Fagan was required to make numerous trips for service. If these witnesses had not been subpoenaed for trial, then Bragg would be claiming that his interest was not fully represented. The *Calk* decision, id at p.500, is unequivocal in its mandate that investigation expenses are reasonable and necessary expenses in a contingency contract case and should be reimbursed.

A. Gill Dyer's response to the alleged theft of the last $980.00 med-pay check is addressed in his June 27, 1995 correspondence to this court and copies of the April 3, 1995 and June 26, 1995 correspondence to the office of the Disciplinary Counsel are attached.

All of the first four med-pay checks were credited to Bragg's cost account, except the $980.00 check which was

contained in the Bragg file when it was removed by Schmidt's theft of the file on December 5, 1994. Schmidt has continued to disguise his specious allegations by complaints against others. There would be no reason for intervenor to credit four med-pay checks to Bragg's cost account and not credit the last one. The only reason is Schmidt's continuous unprofessional behavior, and his reasons for placing the final $980.00 med-pay check in intervenor's account can only be known to him.

Respectfully submitted,

Martin E. Regan, Jr. – #11153
2125 St. Charles Avenue
New Orleans, Louisiana 70130
Telephone: (504) 522-7260

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing same in the United States Mail, first class, postage prepaid and properly addressed, this 25th day of July, 1996.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF **MISCELLANEOUS**

A. GILL DYER **NO. 95-1939 "T"**

ORDER

(Filed Oct. 2, 1996)

The United States District Court for the Eastern District of Louisiana meeting *en banc* considered the attached Findings and Recommendations regarding the captioned disciplinary matter and, by a unanimous vote, determined the following:

IT IS ORDERED that A. Gill Dyer is hereby disbarred from the practice of law before this Court;

IT IS FURTHER ORDERED that the Clerk of Court strike A. Gill Dyer's name from the roll of attorneys authorized to practice law before this Court.

New Orleans, Louisiana, this 2nd day of October, 1996.

/s/ G. Thomas Porteous
JUDGE
G. THOMAS PORTEOUS, JR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF **MISCELLANEOUS**

A. GILL DYER **NO. 95-1939 "T"**

FINDINGS AND RECOMMENDATIONS

BACKGROUND

On April 20, 1995, Chief Judge Morey L. Sear received charges of professional misconduct against A. Gill Dyer, the attorney who originally was co-counsel for plaintiff in *Lenuel Bragg v. Daniel Maloney, et al.*, C.A. No. 93-3649, Section "C" (E.D. La.). Bragg allegedly sustained personal injuries in an automobile accident with a Plaquamines Parish sheriff's deputy. The misconduct complaint was filed by F. Evans Schmidt, the attorney who retained Dyer to act as his co-counsel.

The complaint alleged that Dyer did not deposit "med pay" reimbursement checks into his trust account but rather into his personal account, and that Dyer "perpetrated a fraud against his client [Bragg] by billing for charges he did not incur, inflating legitimate charges and billing costs on other files to the client [Bragg] pursuant to a case in the Eastern District of Louisiana." At the time the complaint was filed, Dyer had been discharged by Bragg and had intervened in the *Bragg* suit to recover his fee and his unreimbursed costs. Dyer's intervention was the subject of hearings held before Magistrate Judge Alma L. Chasez on February 7 and 9, 1995, and was taken under advisement.

Pursuant to Disciplinary Rule III(a)(3), Chief Judge Sear presented this matter to the Court *en banc* at its May 3, 1995 Judges' Meeting for consideration. At the *en banc* meeting, the Court unanimously resolved that the complaint against Dyer be deferred and that no action be taken until Magistrate Judge Chasez had ruled on Dyer's intervention and until Judge Ginger Berrigan determined any appeal that may have been timely filed.

On May 15, 1995, Schmidt again wrote to Chief Judge Sear and advised that State Farm Insurance Company had issued a $982.00 "med pay" check dated November 28, 1994, made payable to Schmidt and Bragg, but had mailed it to Dyer's office. Additionally, Schmidt advised that he aforementioned check was negotiated by Dyer on March 20, 1995, and that neither Schmidt nor Bragg endorsed the check.

Magistrate Judge Chasez issued a Report and Recommendation on May 24, 1995, and a Supplemental Report and Recommendation on June 9, 1995, both dealing with the amount of attorney's fees and costs sought by Dryer in his intervention. In her rulings, Magistrate Judge Chasez drastically reduced the amount of costs sought by Dyer and ordered him to remit back to the Clerk of Court the sum of $1,182.73, which had been paid to Dyer in error.[1]

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[1] On February 8, 1995, Magistrate Judge Chasez had ordered that the settlement funds from State Farm Insurance Company in the amount of $23,000.00 be placed into the Registry of the Court. On March 8, 1995, Judge Berrigan ordered that Dyer receive $1,180.00 plus accrued interest from the money previously deposited into the Registry of the Court.

Dyer objected to Magistrate Judge Chasez's Report and Recommendation and Supplemental Report and Recommendation. On July 26, 1995, Judge Berrigan ordered that Magistrate Judge Chasez's Report and Recommendation and Supplemental Report and Recommendation be adopted as her own opinions.

At the June 14, 1995 *en banc* Judges' Meeting, Schmidt's disciplinary complaint against Dyer was again presented to the Court for consideration. The Court voted unanimously that the disciplinary complaint be docketed and allotted and that the allotted judge appoint an Assistant United States Attorney to investigate the disciplinary complaint and issue a report as required by Disciplinary Rule III(B)(1). The case was allotted to me and I appointed Assistant United States Attorney Thomas L. Watson to act as investigatory counsel.

AUSA Watson conducted a thorough investigation into this matter, including taking the depositions of Dyer and Yvonne Burst (Dyer's then secretary), interviewing Schmidt and Bragg, obtaining Dyer's banking records at Jefferson Guaranty Bank, obtaining all "med pay" checks with endorsements issued by State Farm Insurance Company made payable to Bragg and Dyer or to Bragg and Schmidt, and hiring a handwriting expert to compare the endorsements on the "med pay" checks.

After receiving AUSA Watson's investigative report, this matter was again presented to the court for consideration at its May 1, 1996 *en banc* Judges' Meeting. The Court voted unanimously that AUSA Watson file a formal disciplinary complaint against Dyer and that proceedings be held in accordance with Disciplinary Rule III(C). On

May 10, 1996, I ordered that AUSA Watson file a formal disciplinary complaint against Dyer and that Dyer show cause within thirty (30) days of service of the disciplinary complaint why he should not be disbarred, suspended, or other disciplinary action imposed.

On May 28, 1996, AUSA Watson field a disciplinary complaint alleging (1) that in assessing costs to Bragg which were excessive, and in some cases fictitious, Dyer engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation in violation of La. Prof. Conduct Rule 8.4(c)[2]; (2) that in forging Bragg's signature and Schmidt's signature on the $982.00 "med pay" check and depositing it into his personal account, Dyer engaged in conduct involving dishonesty, fraud, deceit, and/or misrepresentation in violation of La. Prof. Conduct Rule 8.4(c); and (3) that Dyer concealed and/or failed to disclose the existence of the $982.00 "med pay" check to the Court, a fact material to the disposition of the issues before the Court, in violation of La. Prof. Conduct Rule 3.3(a)(2).

Dyer filed a Motion to Dismiss Disciplinary Proceedings for Failure to State a Claim. In his motion, Dyer alleges that Schmidt forged Bragg's signature and signed his own name to the $982.00 "med pay" check in question and deposited it into Dyer's personal account using one of Dyer's personal deposit slips which Schmidt removed – along with the file containing the "med pay" check – from Dyer's office on December 5, 1994. While it is not

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[2] This Court has adopted the Rules of Professional Conduct adopted by the Louisiana Supreme Court as its own. Disc. Rule I(D).

clear from his motion, Dyer seems to allege that the overcharges and fictitious charges were mistakes and/or were sanctioned by the contract between him and Schmidt which required that Dyer pay all costs associated with this matter and that he would be reimbursed out of any settlement/judgment.

On August 1, 1996, I ruled that since disciplinary proceedings in this Court are governed by the Federal Rules of Civil Procedure, Dyer was permitted to file such a motion. I also ordered AUSA Watson to respond to Dyer's motion. I further ordered that Dyer's motion would be decided on the briefs, without oral argument, and a recommendation regarding what discipline should be imposed, if any, would be presented to the Court *en banc* based upon the written submissions. After reviewing AUSA Watson's response to Dyer's motion, it became clear that a hearing was necessary because there were factual issues which needed to be resolved. (*See* Disc. Rule III(C)(3)). A hearing was held on September 17, 1996.

I will addresses each of the allegations made by AUSA Watson against Dyer and Dyer's arguments in response to those allegations.

In addressing the allegations and Dyer's arguments in response, it should be noted that the standard of proof to be applied in a disciplinary proceeding in this Court is one of "clear and convincing evidence" that the offending attorney has committed the misconduct charged. *In re Thalheim*, 853 F.2d 383 (5th Cir. 1988); *In re Medrano*, 956 F.2d 101 (5th Cir. 1992).

OVERCHARGES AND FICTITIOUS CHARGES

As previously stated, Bragg was rear ended by a Plaquemines Parish deputy sheriff on November 6, 1992. He suffered a closed head injury with complaints of headaches and dizziness. Shortly thereafter, Bragg retained Schmidt as his attorney. In November 1993, Schmidt associated Dyer on the case as co-counsel, and their agreement was that they would split the 40% contingency fee (60% to Schmidt and 40% to Dyer) and that Dyer would "pay all costs in this matter and will be reimbursed out of the settlement and/or judgment."

In mid-November 1994, Bragg settled with one of the defendants, State Farm Insurance Company, for $25,000.00. On November 30, 1994, Schmidt and Dyer met to discuss disbursement of the funds. At that meeting, Schmidt contends that Dyer provided him with only a "Final Disbursement" sheet which documented $4,978.20 in costs incurred up to that time and an estimated $1,000.00 in projected anticipated expenses through trial. Dyer asked Schmidt for $5,978.20 to cover these "actual" and anticipated expenses. Schmidt drew a check on his trust account and gave it to Dyer. According to Schmidt, it occurred to him that $4,978.20 was an exorbitant amount for costs since this was a simple automobile case and State Farm Insurance Company was paying Bragg's medical expenses. Schmidt contends that he asked Dyer for an itemized accounting of the costs allegedly incurred by Dyer so that he could explain them to Bragg. According to Schmidt, Dyer stated that he would provide such an accounting, but never did.

Dyer, on the other hand, contends that at the November 30, 1994 meeting with Schmidt, he provided Schmidt with the "Disbusement Sheet" along with a four page itemized costs statement dated November 22, 1994. In any event, Schmidt went to Dyer's office on December 5, 1994 and retrieved the *Bragg* file under the pretext that he was bringing it to Dyer at a deposition. Prior to retrieving the file from Dyer's office, Schmidt had spoken with Bragg, who agreed that Schmidt should obtain the file.

I find it irrelevant whether Dyer provided Schmidt with the itemized cost statement on November 30, 1994. In his motion, Dyer seems to argue that Schmidt somehow altered the itemized cost statement is contrary to Dyer's deposition testimony taken on February 6, 1995. After reviewing the itemized cost statement, Dyer testified that the itemized cost statement in the file produced at his deposition was a true copy of his original. Moreover, Dyer testified that he reviewed the itemized cost statement after it was prepared.

Other than his nebulous argument that Schmidt somehow altered the itemized cost statement, Dyer's only explanation for the overcharges and fictitious charges contained in the itemized cost statement is that they were mistakes.

Magistrate Judge Chasez and Judge Berrigan thoroughly examined and identified each overcharge or fictitious charge that Dyer attempted to impose on Bragg. There is no need to replicate the Magistrate Judge's and the Judge's findings here. However, certain of the more egregious charges should be highlighted.

Dyer charged $200.00 for opening a new file when Schmidt associated him on the case. There is no evidence that Schmidt or Bragg consented to this charge. Dyer testified that it is always his practice to post a $200.00 cost when opening a file. Concluding that such a charge is properly subsumed as overhead, the Court disallowed it.

Dyer's charges for certain office expenses such as photocopies, telephone calls, facsimiles, and postage were very high, although not demonstrably fraudulent. These charges were drastically reduced or eliminated by Magistrate Judge Chasez and Judge Berrigan. For example, Dyer billed 40 cents per page for photocopies. The Court allowed 7 cents per page. Dyer billed $90.00 for telephone calls. The Court disallowed this supposed expense. Dyer billed $5.00 per facsimile whether sent or received. The Court disallowed this supposed expense. Dyer billed $150.00 for postage, which meant that 291 ounces (over 18 pounds) of documents were alleged to have been mailed. The Court allowed $29.00, the cost of a roll of 100 stamps.

Some of the other expenses billed by Dyer were demonstrably false. Dyer billed $237.50 for services performed by Legal Wings Delivery Service. The Legal Wings Delivery Service records for *Bragg* reflect only $37.50 in charges. Dyer testified that this was a mistake. The Court allowed $37.50.

Dr. Chad Millet's bill was charged to Bragg as $750.00. Dr. Millet's actual bill reflects that Dyer paid $600.00 and received a credit of $150.00, for an actual expense of $450.00. Dyer's explanation was that the

$150.00 credit had been mistaken for another charge, thus yielding the $750.00 figure. This may seem to be a plausible explanation if there were not so many other errors, which resulted in higher, rather than lower, expenses billed to Bragg.

Dyer billed $2,195.00 for an MRI performed by Diagnostic Management Affiliates. The actual cost of the MRI was $1,628.00 with an interest charge of $170.94. The Court allowed $1,798.94, creating a discrepancy of $396.96 between what was billed by Dyer and what was actually charged. Dyer had no explanation for this discrepancy except that his secretary must have gotten the wrong figure when she posted the charge on the itemized cost statement.

There were also several substantial overcharges for depositions. The cost of the depositions of Lott and Machella, transcribed by Lanasa and Associates, was billed by Dyer at $569.00. Lanasa and Associates' actual charge was $461.00. The cost of the deposition of Laverne, transcribed by Dickelman and Associates, was billed by Dyer at $261.15. Dickelman and Associates' actual charge was $161.15.

Dyer billed another apparent $100.00 overcharge when he posted a $699.00 charge for a closed head injury videotape from Technical Medical Animation Corporation ("TMAC"). The actual cost of the video was $599.00. However, when a subpoena was issued to TMAC, it revealed that the videotape **had never even been ordered,** much less paid for. This resulted in a fictitious charge to Bragg of $699.00.

In summary, Magistrate Judge Chasez and Judge Berrigan concluded that the following items were either overcharge or fictitious charges:

Item	Amount Charged by Dyer	Amount Allowed by the Court	Overcharge
Fee to Open File	$ 200.00	- 0 -	$ 200.00
Photocopies	$ 395.50	$ 56.35	$ 339.15
Facsimiles	$ 100.00	- 0 -	$ 100.00
Postage	$ 150.00	$ 29.00	$ 121.00
Airborne Express	$ 26.20	- 0 -	$ 26.20
Legal Wings	$ 237.50	$ 37.50	$ 200.00
Telephone Charges	$ 90.00	- 0 -	$ 90.00
Diagnostic Management Affiliates (MRI)	$2,195.00	$1,798.94	$ 396.06
Dr. Chad Millet	$ 750.00	$ 450.00	$ 300.00
Filing Fee	$ 120.00	- 0 -	$ 120.00
Depositions:			
Lott & Machella	$ 569.00	$ 461.00	$ 108.00
Laverne	$ 261.15	$ 161.15	$ 100.00
Service of Subpoenas	$ 450.00	- 0 -	$ 450.00
Parking/Mileage	$ 32.00	- 0 -	$ 32.00
TMAC Videotape	$ 699.00	- 0 -	$ 699.00
TOTAL OVERCHARGES AND FICTITIOUS CHARGES			**$3,281.41**

Magistrate Judge Chasez and Judge Berrigan documented these fifteen overcharges and fictitious charges totaling $3,281.41, approximately 13 percent of the gross settlement amount of $25,000.00. If these were all mistakes as Dyer argues, I would expect there would one or

two "mistakes" in Bragg's favor. However, every "mistake" was in Dyer's favor.

Dyer argues in his motion that his contract with Schmidt gave him the right to recover "all costs." I agree that the contract entered into between Dyer and Schmidt did allow Dyer to be reimbursed for "all costs." However, Dyer's right to recover "all costs" certainly did not include recovery of inflated costs for depositions, services that were not rendered, videotapes that were not ordered or paid for, postage that was not used, and photocopies that were not made. No contract between two attorneys gives one of the attorneys the right to defraud an innocent third party – in this case his client, Bragg – to whom the attorney owes a particular fiduciary duty. Dyer's conduct in attempting to collect over-charges and fictitious charges under the guise of the language in the contract which allowed him to be reimbursed for "all costs" is precisely the kind of behavior that damages the integrity of the legal profession.

For the above stated reasons, I find that, by clear and convincing evidence, Dyer's conduct violated La. Prof. Conduct Rule 8.4(c), which provides, "It is professional misconduct for a lawyer to . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

THE FORGED CHECK

In the formal disciplinary complaint, AUSA Watson alleges that a $982.00 "med pay" check from State Farm Insurance Company dated November 28, 1994 was made payable to Schmidt and Bragg. AUSA Watson further alleges that Dyer forged the endorsements of Schmidt

and Bragg on the $982.00 "med pay" check and deposited it into his personal checking account on March 20, 1995.

AUSA Watson's allegations are complicated by the fact that Schmidt obtained the *Bragg* file from Dyer's office on December 5, 1994 under false pretenses, and it is unclear, at first blush, whether the check was in the file. However, the chronology of events and other circumstances rebut – by clear and convincing evidence – Dyer's contention that Schmidt forged Bragg's endorsement on the check and deposited it into Dyer's personal account.

First, Dyer admitted that he signed his own name on two previous "med pay" checks dated June 24, 1994 and August 22, 1994. Dyer testified that it was his practice to either sign the client's name on the back of the checks or have his secretary to do so. Dyer's then secretary, Yvonne Burst, examined both checks and denied under oath that she signed Bragg's name to either check. Therefore, by Dyer's own admission, he signed Bragg's name on the back of both of the previously issued "med pay" checks.

Second, William J. Farrell, Jr., a handwriting expert retained by AUSA Watson during his investigation, opined that the purported endorsement by Bragg on the $982.00 "med pay" check was not written by Bragg, and the purported endorsement by Schmidt on the same check was not written by Schmidt. The handwriting expert further opined that "more likely than not" the Bragg endorsement on the $982.00 check was written by the same person who endorsed Bragg's name on the back of the two previously issued "med pay" checks.

Dyer contends that there were copies of the two previously issued "med pay" checks (with endorsements)

along with the $982.00 "med pay" check, in the file when Schmidt retrieved it from Dyer's office on December 5, 1994. Dyer further contends that Schmidt took personal deposit slips from his office when he retrieved the file. Dyer also contends that Schmidt used the endorsements on the two previously issued "med pay" checks as a model to forge Bragg's signature and his own signature on the $982.00 check and deposit it into Dyer's personal checking account on March 20, 1995. After hearing Dyer's story, I find that nothing he says is believable.

It must be noted that on April 29, 1995, State Farm Insurance Company mailed copies (front and back) of the two previous "med pay" checks to Schmidt in response to a subpoena. Both of the previously issued and negotiated checks were made payable to "Lenuel Bragg and attorney A. Dill (sic) Dyer." Also enclosed in the April 29, 1995 subpoena return was the check made payable to "Lenuel Bragg and his attorney of record F. Evans Schmidt" in the amount of $982.00. Shortly after receiving copies of the negotiated checks, Schmidt notified Chief Judge Sear that Dyer had forged his signature and Bragg's signature on the $982.00 check and negotiated it. I find that Schmidt did not have copies of any of the checks with endorsements until he received them from State Farm Insurance Company sometime after April 29, 1995. Accordingly, I find that the $982.00 "med pay" check was not in the file when Schmidt retrieved the file from Dyer's office on December 5, 1994.[3]

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[3] This finding is supported by the testimony of Dyer's then secretary, Yvonne Burst. Ms. Burst testified that on December 5, 1994, at approximately 12:30 p.m., she put the $982.00 check into

At the September 17, 1996 hearing, Dyer argued that he had deposited all previous "med pay" checks into his cost account, and stated that he had no reason to do anything differently with the $982.00 "med pay" check. However, a review of Dyer's bank records demonstrates his motive for removing the $982.00 check from the file prior to his meeting with Bragg's treating physician. On March 20, 1995, when the $982.00 check was deposited into Dyer's personal checking account, his bank statement reflected a balance of $14.96.[4] On March 21, 1995, Dyer wrote a check in the amount of $633.34 on his personal account to Jefferson Guaranty Bank on an outstanding loan secured by his residence. Dyer's payment was for the February and March payments on this loan, which was then in arrears. According to correspondence from Ichelle H. D'Angelo, Assistant Vice President of Jefferson Guaranty Bank, to Dyer dated March 23, 1995, she had met with Dyer the week before the $982.00 check was deposited into his personal account to discuss this

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the *Bragg* file and placed the file in a cabinet. Dyer was at lunch during this time. Dyer returned to the office approximately fifteen minutes before a meeting with Bragg's treating physician. From where Ms. Burst sat, she could not see the file cabinet where she had placed the *Bragg* file. Under the circumstances, it is highly likely that Dyer took the $982.00 check from the file prior to his leaving to meet with Bragg's treating physician.

[4] It should be noted that Dyer would have received his bank statement on or about April 12, 1995. One would think that a $982.00 deposit of unknown origin would cause Dyer to inquire how the check made its way into his account, particularly since Dyer contends that a check for that exact amount was in the *Bragg* file when Schmidt took the file from his office.

and another loan which was then three months delinquent and $2,598.23 in arrears. Additionally, Dyer's bank records reflect numerous overdrafts and NSF checks during the months before and after the deposit of the $982.00 check. Ultimately, the bank foreclosed on Dyer's residence. Moreover, Dyer testified that the IRS had a $65,000.00 tax lien against him for unpaid 1992 income taxes. In summary, the evidence clearly and convincingly shows that at the time the $982.00 check was deposited, Dyer was suffering from severe financial difficulties which motivated his forgery and deposit of the $982.00 "med pay" check.

It would have been an incredible turn of events from Dyer's standpoint had Schmidt chosen to frame Dyer by depositing the $982.00 check into Dyer's account on the day before Dyer needed the funds to make a $633.34 loan payment to the bank. Had the check not been deposited on March 20, 1995, the loan payment would have caused a $618.38 overdraft in Dyer's checking account. This is one more fact that shows that Schmidt had nothing to do with the forgery and deposit of the $982.00 "med pay" check into Dyer's personal checking account.

Based upon the above, I find by clear and convincing evidence that Dyer forged the endorsements of Bragg and Schmidt on the $982.00 check and deposited into his personal account for his own use. Dyer's conduct is clearly in violation of La. Prof. Conduct Rule 8.4(c).

FAILURE TO DISCLOSE THE $982.00 CHECK TO THE COURT

In the formal disciplinary complaint, AUSA Watson alleges that Dyer failed to disclose the existence of the $982.00 "med pay" check to the Court during the course of the proceedings to determine the legitimacy of the expenses Dyer charged to Bragg. Dyer does not address this charge in his motion.

I have determined that Dyer, and Dyer alone, forged the endorsements and deposited the $982.00 "med pay" check into his personal account. Dyer's conduct in this regard is all the more serious where, as here, the integrity of court proceedings is directly implicated. The precise issue – the amount of expenses incurred by Dyer in the *Bragg* case – was in litigation before Magistrate Judge Chasez at the time the $982.00 check was negotiated. At the September 17, 1996 hearing, Dyer stated that he did not tell Magistrate Judge Chasez or Judge Berrigan about the $982.00 "med pay" check because he did not think it was important. The existence of the check, of which Dyer admittedly was aware, should have been disclosed to the Court promptly.

I find by clear and convincing evidence that Dyer's failure to disclose the existence of the check was in violation La. Prof. Conduct Rule 3.3(a)(2), which provides, in pertinent part, "A lawyer shall not knowingly . . . (2) conceal or knowingly fail to disclose that which he is required by law to reveal. . . . "

RECOMMENDATION

Disciplinary proceedings are not primarily to punish the lawyer, but to protect the courts and the public from unprofessional conduct. *Louisiana State Bar Ass'n v. Alker,* 491 So.2d 1328 (La. 1986). A penalty for misconduct by a lawyer deters future misconduct, protects the public from such misconduct, and maintains confidence in the legal system. *Louisiana State Bar Ass'n v. Alker,* 530 So.2d 1138 (La. 1988).

The misuse of a client's funds is the gravest form of professional misconduct. It strikes at the heart of public confidence in the legal profession. Attempting to bill the client for blatant overcharges and fictitious charges is equally grave and reprehensible. Additionally, Dyer failed to disclose a fact material to the disposition of pending litigation.

The Louisiana Supreme Court has set forth guidelines for determining the appropriate penalty in cases of misuse of the client's funds and perpetrating a fraud upon the client. *Louisiana State Bar Ass'n v. Hinrichs,* 486 So.2d 116 (La. 1986). Disbarment is usually appropriate when one or more of the following elements are present: the lawyer acts in bad faith and intends a result inconsistent with his client's interest; the lawyer commits forgery or other fraudulent acts in connection with the violations; the magnitude or the duration of the deprivation is extensive; the magnitude of the damage or risk of damage is great; expense and inconvenience caused the client is great; and/or the lawyer either fails to make full restitution or does so tardily after extended pressure of disciplinary or legal proceedings.

I find that all of the foregoing elements are present. Accordingly, I recommend that A. Gill Dyer's Motion to Dismiss Disciplinary Proceedings for Failure to State a Claim be denied and that he be disbarred.

New Orleans, Louisiana, this 23rd day of September, 1996.

/s/ G. Thomas Porteous
JUDGE
G. THOMAS PORTEOUS, JR.

APPENDIX
LOCAL CIVIL RULE 83.2.10E
RULES OF DISCIPLINARY ENFORCEMENT
OF THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF LOUISIANA

RULE I
JURISDICTION AND GOVERNING RULES

A. Admission of an attorney to the bar of this court or other authorizations to practice before this court confer disciplinary jurisdiction upon the court.

B. Unless otherwise provided by these or other applicable local rules or otherwise determined by the court, all procedures in disciplinary actions, including discovery, shall be governed by the Federal Rules of Civil Procedure.

C. Nothing contained in these Rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

D. The court hereby adopts the Rules of Professional Conduct adopted by the Supreme Court of the State of Louisiana, as amended from time to time by said

Supreme Court, except as otherwise provided by specific rule of this court.

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